APPEAL NO. 172119

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 1, 2017, in (City), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ).[1] The ALJ resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on November 20, 2015; and that the claimant's impairment rating (IR) is 46%.

The claimant appealed the ALJ's determinations arguing the same are so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The respondent (carrier) responded, urging affirmance and arguing that the Appeals Panel does not have jurisdiction to consider the claimant's appeal because a request for review was not timely filed.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained compensable injuries on (date of injury), when the tanker truck he was driving overturned resulting in molten asphalt flowing into the cab of the truck and onto the claimant. The parties stipulated that the carrier has accepted as compensable 40% surface burns, left knee amputation above the knee, ear deformity, scalp laceration and concussion. The parties further stipulated that the statutory date of MMI is July 27, 2016.

JURISDICTION

Section 410.202(a) provides that to appeal the decision of an ALJ, a party shall file a written request for appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the ALJ is received from the Texas Department of Insurance, Division of Workers' Compensation (Division) and shall on the same date serve a copy of the request for appeal on the other party. Section 410.202(d) provides that Saturdays and Sundays and holidays listed in Texas Government Code Section 662.003 are not included in the computation of the time in which to file an appeal or a

[1] Section 410.152 was amended in House Bill 2111 of the 85th Leg., R.S. (2017), effective September 1, 2017, changing the title of hearing officer to ALJ.

response. 28 TEX. ADMIN. CODE § 143.3(d) (Rule 143.3(d)), effective December 13, 2009, provides that a request for review shall be presumed to be timely filed if it is: (1) mailed on or before the 15th day after the date of deemed receipt of the ALJ's decision; and (2) received by the Division not later than the 20th day after the date of deemed receipt of the ALJ's decision. The Appeals Panel has held that both portions of Rule 143.3(d) must be complied with for an appeal to be timely. Appeals Panel Decision (APD) 042688, decided December 1, 2004.

Records of the Division reflect that the ALJ's decision was mailed to the claimant and his attorney at their correct respective addresses on August 4, 2017. Pursuant to Rule 102.5(d), unless the great weight of the evidence indicates otherwise, the claimant was deemed to have received the ALJ's decision 5 days later. The 5th day after August 4, 2017, was Wednesday, August 9, 2017. With the deemed date of receipt of the ALJ's decision on August 9, 2017, in accordance with Section 410.202, excluding Saturdays and Sundays and holidays listed in Texas Government Code Section 662.003, the appeal had to be filed or mailed no later than Wednesday, August 30, 2017.

The claimant, a resident of County, Texas, filed what he describes as a "short, memorandum to preserve his ability to file a complete [request for review]" after all power was lost in his attorney's office, also situated in County, Texas, at 4:45 P.M. on August 30, 2017, due to the effects of Hurricane Harvey. This initial request for review was sent to and received by the Division via facsimile transmission on August 30, 2017, at 8:19 P.M. A second more comprehensive request for review was filed by the claimant on September 13, 2017.

The Governor of the State of Texas issued a disaster proclamation on August 23, 2017, certifying that Hurricane Harvey posed a threat of imminent disaster to a number of counties in Texas, including Nueces County. On August 29, 2017, the Commissioner of Workers' Compensation issued Commissioner's Bulletin # B-0020-17, which provides, in part:

> For system participants who reside in the counties listed in the Governor's disaster proclamation, the Texas workers' compensation deadlines for the following procedures are tolled through the duration of the Governor's disaster proclamation:
>
> - Medical and income benefit dispute deadlines.

The Governor's disaster proclamation and Commissioner's Bulletin # B-0020-17 were both in effect on August 30, 2017 (when the appeal would otherwise have been due), on September 13, 2017 (when the complete appeal was filed), and at all times in

between. Because the claimant and his attorney are residents of a county listed in the Governor's disaster proclamation, the appeal deadlines in this case were tolled during the periods at issue. Accordingly, the claimant's appeal is timely and the Appeals Panel has jurisdiction to consider it.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

There are three certifications of MMI and assignment of IR in the record. (Dr. K), the designated doctor appointed by the Division, examined the claimant on November 16, 2016, and certified that the claimant reached statutory MMI on July 26, 2016, with a 45% IR. With regard to MMI, Dr. K recited that he based the MMI date on his physical examination, medical records submitted for review and consideration of the Official Disability Guidelines (ODG). Dr. K's IR assignment was comprised of 32% for the above the knee left leg amputation together with 10% skin disorder and 10% left upper extremity range of motion (ROM) loss.

(Dr. KM), a referral of the treating doctor, examined the claimant on August 9, 2016, and certified that the claimant reached statutory MMI on July 20, 2016, with a 45% IR. With regard to MMI, Dr. KM stated "[t]he employee is still undergoing significant clinical therapy with anticipated improvement and the adjuster has indicated the worker achieved statutory MMI on July 20, 2016". Dr. KM's IR assignment was comprised of 32% for the above the knee left leg amputation together with 10% skin disorder, 10% left upper extremity ROM loss and 0% for the claimant's concussion.

(Dr. D), the carrier's choice of physician, examined the claimant on February 2, 2017, and certified that the claimant reached clinical MMI on November 20, 2015, with a 46% IR. With regard to MMI, Dr. D indicated that by such date ODG treatment recommendations, including treatment for burns, prosthetic adjustment and physical therapy, had been rendered. Dr. D further stated that treatment rendered after November 20, 2015, is chronic maintenance care and would not result in any further material improvement in the claimant's condition. Dr. D's IR assignment was comprised of 32% for the above the knee left leg amputation together with 10% skin disorder, 10%

left upper extremity ROM loss, 2% for the ear deformity, 0% for the scalp laceration and 0% for the concussion.

The ALJ correctly determined that neither the certification of Dr. K nor the certification of Dr. KM could be adopted because neither of these physicians rated the entire compensable injury. Furthermore, both Dr. K and Dr. KM determined that the claimant reached MMI on the statutory date; however, each doctor certified MMI on a date that is not the correct date of statutory MMI.

The ALJ instead determined that the claimant reached MMI on November 20, 2015, with a 46% IR in accordance with the certification of Dr. D and in her Finding of Fact No. 6, states that Dr. D's certification of MMI and IR is supported by the preponderance of the evidence. We disagree.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986).

Evidence in the record reflects that requests for occupational therapy to address the claimant's left elbow contracture were denied by the carrier in December 2015, and in January 2016; and that the claimant had fallen at least three times as of October 2015, due to difficulties with his prosthetic leg. Furthermore, in an affidavit dated July 12, 2017, the claimant's treating doctor, (Dr. M), stated:

> On March 31, 2016, I noted that the mechanical prosthesis needed repairs and that he was provided a "loaner" pending repairs. I also noted that we would look to starting therapy once the C-Leg was received.
>
> As such, additional physical therapy for the left leg prosthetic is needed and will be beneficial to [the claimant] and I would anticipate, in reasonable medical probability, the physical therapy will provide further functional recovery and provide lasting improvement to his injuries and well being.
>
> I have personally examined [the claimant] as recently as June 27, 2017. At this time, I noted that [the claimant] still has restricted [ROM] to his left arm and that he never received the occupational therapy I ordered.
>
> It is usual and custom (sic) for patients like [the claimant] to have at least two prosthetics available to them for use, in case one is damaged and/or

> malfunctions. [The claimant] received his C-Leg (microprocessor) prosthesis on April 15, 2016. He uses both the C-Leg and the mechanical prostheses. [The claimant] received limited physical therapy to learn to walk using the computerized prosthesis since delivery. [The claimant] requires physical therapy in order for him to learn to walk using the microprocessor knee prosthesis as he continues to fall while attempting to ambulate currently. This physical therapy will in all reasonable probability provide lasting improvement in safe ambulation and mobility. Furthermore, therapy will be required on every prosthetic replacement occurring every 3 to 5 years.

Considering all the evidence, we find the ALJ's determination that the claimant reached MMI on November 20, 2015, with a 46% IR to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We accordingly reverse the ALJ's determinations that the claimant reached MMI on November 20, 2015, with a 46% IR and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. K is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. K is still qualified and available to be the designated doctor. If Dr. K is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI/IR for the (date of injury), compensable injury.

The ALJ is to advise the designated doctor that the compensable injury of (date of injury), extends to 40% surface burns, left knee amputation above the knee, ear deformity, scalp laceration and concussion. The ALJ is to further advise the designated doctor that the date of statutory MMI in this case is July 27, 2016. The ALJ is to request that the designated doctor give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) considering the medical record and the certifying examination. The ALJ is to instruct the designated doctor that the MMI date may not be later than July 27, 2016, the date of statutory MMI.

The parties are to be provided with the designated doctor's MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is to reconsider the evidence

on MMI/IR, including the designated doctor's certification, and make a determination concerning MMI/IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ACCIDENT FUND GENERAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge